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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 80-6151

AMOS LEE KING,

Petitioner,

ORIGINAL COPY

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

Whether the trial court's excusal for cause of prospective jurors because of their expressed beliefs against the death penalty violated petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 390 So.2d 315 (Fla. 1980).

JURISDICTION OF THE SUPREME COURT

Respondent agrees that jurisdiction is properly invoked pursuant to 28 USC § 1257(3) and the Court can exercise jurisdiction to the extent that a substantial federal question is presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent acknowledges that the constitutional provisions involved are the Sixth and Fourteenth Amendments of the United States Constitution. The statutory provision involved is F. S. 913.13 which is reproduced at Page 5 of the Petition.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case as stated on pages five through seven of the petition but would add the following:

Trial defense counsel did not object to the excusal of juror Mrs. Holenda or seek to qualify her as required by state law. Moreover, after the juror stepped down defense counsel informed the court that he did not see a serious problem at that time. King v. State, 390 So.2d 315, at 319 (Fla. 1980). The challenge to Mrs. Holenda's excusal was initiated on appeal.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioner contends that the trial court's excusal of prospective juror Mrs. Holenda violated this court's ruling in Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776 (1968) and that this court should grant his petition.

The petition should be denied because no substantial federal or constitutional question is presented. Petitioner

failed to object to the excusal of this prospective juror nor did he attempt to qualify her as required by state law. Paramore v. State, 229 So.2d 855 (Fla 1969), vacated on other grounds 408 U. S. 935; Brown v. State, 381 So.2d 690 (Fla. 1980) cert den _US_, 28 Cr.L.4164 (Case No. 80-5708, January 19, 1981). There is, therefore, an independent state ground precluding certiorari review. See Wainwright v. Sykes, 433 U. S. 72, 53 L.Ed. 2d 594 (1977). Not only did petitioner fail to contest the excusal of Mrs. Holenda, he also affirmatively told the trial judge that there was no serious problem at that time (R2246). King v. State, 390 So.2d 315, at 319 (Fla. 1980).

Quite apart from petitioner's procedural default on this point, the record reflects that the lower court was correct in finding that the juror sufficiently indicated her reservations about capital punishment would prevent her from making an impartial decision as to the guilt of the accused. A review of the complete colloquy between trial judge and potential jurors supports the conclusion of the lower court. For example Mrs. Holenda was sworn at R2236 and was among the group when the trial judge inquired at R2239:

> "The Court: Again I will direct this question to each of those of you who have just entered the box: As you are aware, one of the charges against this defendant carries a possible punishment of death in the electric chair. Do any of you have any conscientiously held opinions as to the death penalty that would prevent you from reaching a verdict?" (emphasis supplied)

Mrs. Holenda responded that she couldn't be impartial because of her capital punishment views. (R2242) Mrs. Holenda understood that the penalty recommendation was advisory, not binding on the trial court, yet reiterated her inability to follow the law. Her excusal was consistent with Witherspoon, supra, and Lockett v. Ohio, 438 U. S. 586, 57 L.Ed. 2d 973 (1978).

Respondent would further note that the role of the jury under Florida's capital sentencing procedure differs substantially from the role played by the jury under Texas law. In Florida, the jury only advises the court on sentencing, the recommendation is not binding. See Lamadline v. State, 303 So.2d 17 (Fla.1974); Hay v. State, 353 So2d 826 (Fla. 1977); State v. Dixon, 283 So.2d 1 (Fla. 1973). On the other hand, in Texas, if the jury answers affirmatively three statutory questions a death sentence must be imposed. To excuse a juror in Texas whose deliberation on any fact might be "affected" by capital punishment views is an impermissible expansion of the Witherspoon disqualification standard. Adams v. Texas, _US_, 65 L.Ed.2d 581 (1980). The juror's admission in Burns v. Estelle, 626 F2d 396 (5 Cir. 1980) that her capital punishment views would affect her deliberations did not constitute a concession she could not follow the state law (unlike the instant case).

The instant petition for writ of certiorari fails to present a substantial federal or constitutional question; accordingly, the petition should be denied.

Respectfully submitted,

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